(2)

No. 95-566

In The

Supreme Court of the United States

October Term, 1995

STATE OF MONTANA,

Petitioner,

v.

JAMES ALLEN EGELHOFF,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is a defendant deprived of his right to due process under Article II, Section 17 of the Montana Constitution and the Fourteenth Amendment to the United States Constitution when a jury is instructed, pursuant to a state statute, that voluntary intoxication may not be taken into consideration in determining the existence of a mental state which is an element of the offense?

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RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the provisions cited by Petitioner, the following is relevant:

Mont. Const. article II, section 17:

> **Due process of law.** No person shall be deprived of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

Respondent, James Allen Egelhoff, was charged with two counts of deliberate homicide, in violation of Mont. Code Ann. § 45-5-102 (1991).

At approximately midnight on July 12, 1992, the bodies of Roberta Pavola and John Christianson were found in the front seat of Christianson's station wagon, and respondent was found in the rear cargo area, alive but intoxicated. Pavola and Christianson had each died from a gun shot wound to the head. Egelhoff's blood alcohol level was between .33 and .36 percent. Egelhoff's consumption of alcohol was voluntary.

At the trial, Egelhoff contended that a fourth person was responsible for the shootings. Proof of respondent's very high level of intoxication was offered to prove that he would not have been physically able to commit the acts charged by the state (including safely driving a dangerous road at night) and to explain his alcohol induced amnesia. He did not offer it to prove that his intoxication prevented him from forming the statutorily requisite state

of mind. This was irrelevant because he denied that he had pulled the trigger.

The state requested, and the trial court gave, over respondent's objection, an instruction pursuant to Mont. Code Ann. § 45-2-203 (1991) as follows:

> A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the Defendant proves that he did not know that it was an intoxicating substance when he consumed the substance causing the condition.

Egelhoff objected to this instruction on several grounds, the primary one being that it was irrelevant and prejudicial because he had not raised the issue of the effect of intoxication upon mental state. Secondarily, he challenged the statute's constitutionality, in denying due process under the Montana and federal constitutions.

Following Egelhoff's conviction, he appealed to the Montana Supreme Court on several grounds. The court limited oral argument to the due process argument, and all seven justices held the statute and the instruction to be unconstitutional as a violation of Egelhoff's right to due process. In the concurring opinion of Justice Nelson, he referred to both the Montana and the federal constitutions in his discussion of the deprivation of due process.

REASONS FOR DENYING THE WRIT

I. There is an independent and adequate state ground.

Respondent relied on both the Montana and federal constitutional due process provisions in challenging the statute. At least one of the seven justices, Justice Nelson, cited the Montana constitution in his opinion. Thus, there is an independent and adequate state ground for the decision. *Michigan v. Long*, 463 U.S. 1032 (1983).

II. The effect of intoxication on respondent's mental state is irrelevant.

At the first trial of this matter, respondent objected to the instruction on intoxication because he had not argued that he was "too drunk to know what he was doing." Rather, he denied doing anything. On a retrial of this matter, it will continue to be irrelevant. This Court should not exercise its discretionary jurisdiction to decide a matter which ought not to have been injected into the trial record in the first place. Wise use of the Court's limited resources militates against their expenditure on an issue irrelevant to this respondent.

III. There is not a considerable disagreement among state courts of last resort on the question at issue in this case.

The rules of this Court defining the limits of this Court's jurisdiction over State courts' rulings on state law do not lend support to petitioner's request that this Court invoke its discretionary jurisdiction to review the opinion below. Rule 10 of the Rules of the Supreme Court of the

United States recites as a reason for granting a writ of certic-ari,

> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

Petitioner cites to only four states whose courts of last resort are claimed to be in conflict with the Montana Supreme Court. Careful analysis of these cases does not support the view that this Court should invoke its discretionary jurisdiction. There is not the "considerable disagreement among state courts of last resort on the question at issue in this case," sufficient to invoke this Court's jurisdiction. *Morgan v. Illinois*, 504 U.S. ___, 119 L. Ed. 2d 492, 500 (1992).

The decisions can be explained by an examination of the historical use in the different states of intoxication evidence. The Montana Supreme Court in its decision ratified a rule had been in effect for years as part of the common law, and was codified in the criminal code until 1987, when the unconstitutional amendment was enacted. *State v. Palen*, 178 P.2d 862 (Mont. 1947), decided under former law (the predecessor to § 45-2-203, M.C.A.), held that voluntary intoxication *must* be considered in a first degree murder case, not as a complete defense, but in determining a mental state. In 1987, the statute was amended to prohibit the consideration of such evidence. The Montana Supreme Court, in holding the amendment unconstitutional, simply returned the practice to the status quo ante, which had been approved by that court for years.

Petitioner cites *State v. Ramos*, 648 P.2d 119 (Ariz. 1982) which is inapposite as the statute construed there did allow the jury to consider intoxication in determining the culpable mental state. Petitioner also cites to the 1993 amendment to that statute which has not been construed and which excludes intoxication as a "defense," which is not inconsistent with the Montana decision.

Delaware's statute cited by petitioner on page 8 of the Petition has eliminated the affirmative defense of voluntary intoxication, Del. Code Ann. tit. 11, § 421 (1976). That is not the issue in the instant action. *Wyant v. State*, 519 A.2d 649 (Del. 1986), goes further than the statute in holding that evidence of intoxication is inadmissible on the issue of state of mind. That opinion recites the "tortuous" history of the Delaware legislation. Montana has had no such history, but has adhered to the rule announced in *State v. Egelhoff* for a century.

Petitioner cites *State v. Souza*, 813 P.2d 1384 (Haw. 1991). However, the Hawaii state statute differs substantially from that struck down in Montana. The Hawaii statute, Haw. Rev. Stat. § 702-230 provides that,

> Evidence of self-induced intoxication of the defendant is admissible to prove or negative conduct or to prove state of mind sufficient to establish an element of the offense. Evidence of self-induced intoxication of the defendant is not admissible to negative the state of mind sufficient to establish an element of an offense.

This language is more consistent with the use of intoxication as a *defense*, which is not the argument here. Presenting evidence to negate proof by the state is in the nature of an affirmative defense such as justification or

duress. It anticipates that the state has carried its burden of proof and that then the defense presents affirmative evidence to rebut the proof. That differs from the situation where the state, as part of its proof, must prove the requisite mens rea, which proof would necessarily, in the case of an intoxicated person, include evidence that, despite the intoxication, the defendant had the requisite mental state which is an element of the charged offense. This evidence is then considered by the jury in its deliberations. An additional qualifier when reading *Souza* is that defendant was charged with murder in the second degree, not first degree. It may be that the charging authority took Souza's intoxication into account when charging a lesser offense as there do not appear to be any other grounds for mitigation in the opinion. One cannot extrapolate from *Souza* that had he been charged with deliberate homicide the same result would have obtained.

The Missouri decision cited by petitioner, *State v. Erwin*, 848 S.W.2d 476 (Mo. 1993), *cert. denied*, 114 S. Ct. 88 (1993) upheld a rule which had there been law for years, except for a four-year hiatus, *State v. Richardson*, 495 S.W.2d 435 (1973). In *Richardson*, the court acknowledged that the Missouri rule was not that of the majority of states, but did not reject it, stating that it declined to consider overturning a rule which went back to 1855. It is clear that the Missouri rule is an anomaly, and the only rationale its longevity. Montana has, by contrast, recognized that voluntary intoxication may be considered by the jury for years. It is an integral part of the common law. This Court should pay deference to these efforts by the states to fashion their particular practices of criminal law which reflect the historical and traditional practices.

The *Erwin* court held that it was error to give the instruction that was given in this case, with respect to the language that an intoxicated person is criminally responsible. It was held to be a comment on the evidence and a denial of due process and the case was reversed for that reason. The State of Missouri petitioned this court to grant certiorari, which was denied, *Missouri v. Erwin*, 114 S. Ct. 88 (1993).

Missouri is perhaps unique in historically prohibiting consideration of intoxication in determining the existence of a mental state. This was changed, for a short time, by legislation passed in 1979, which adopted the majority rule, § 562.076, Missouri Revised Statutes, so that the statute than read, in pertinent part:

> 1. A person who is in an intoxicated or drugged condition whether from alcohol, drugs, or other substances, is criminally responsible for conduct unless such condition
>
> (1) Negatives the existence of the mental states of purpose or knowledge when such mental states are elements of the offense charged or of an included offense. . . .

The comment to the proposed code stated:

> Subsection 1(1) adopts the view of the vast majority of jurisdictions that where the crime requires that to be guilty the defendant must have had a specific mental state, evidence of his being intoxicated is admissible as bearing on whether he did in fact have that mental state. Missouri (along with possibly two other states) does not follow this approach, but instead

> excludes evidence of the defendant's intoxication on the issue of whether he had the required "specific intent."

Four years later, the Missouri legislature amended § 562.076 to again prohibit the consideration of intoxication evidence on the existence of a mental state.

Citation to these four jurisdictions is not evidence of the considerable disagreement among state courts of last resort necessary to invoke this court's jurisdiction.

IV. There is not presented an important question of federal law which has not been, but should be, settled by this Court, nor does the decision conflict with applicable decisions of this Court.

Rule 10 of the Rules of the Supreme Court of the United States also recites as a reason for granting a writ of certiorari,

> (c) When a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

This Court has visited a similar question some time ago. Although the opinion did not rest on the due process analysis which has evolved in the last half century, this Court considered this issue in *Hopt v. People*, 104 U.S. 631, 633-634 (1881). There, a Utah defendant had been convicted of deliberate homicide for an act committed while intoxicated. He petitioned to this Court, claiming that he

was entitled to have an instruction to the jury that intoxication could be considered when determining his mental state. This Court, in reversing his conviction, stated:

> At common law, indeed, as a general rule, voluntary intoxication affords no excuse, justification or extenuation of a crime committed under its influence. (citations omitted) But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question, whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury. . . . (citations omitted)

Hopt has been cited for this rule in numerous cases and annotations. It has never been overruled or modified by this Court, and its logic is contemporary despite its age. This Court has not seen fit to revisit this issue and the decision of the Montana Supreme Court employs the same logic in arriving at a compatible result. There is no compelling reason for this Court to undertake to fine tune this sort of practice.

There is no compelling reason why this Court should undertake to decide this issue for all of the states.

Petitioner argues, at page 13 of the Petition for Writ of Certiorari,

> If a state can constitutionally limit the application of voluntary intoxication as a defense, and the use of such evidence with respect to certain crimes, there is no reasoned basis to conclude

> that a state cannot take the next step and preclude the defendant from relying on it to negative the existence of the required mental state.

Petitioner cites *United States ex rel. Goddard v. Vaughn*, 614 F.2d 929, 935 (3rd Cir.), *cert den.*, 449 U.S. 844 (1980), as authority for the assertion that states "can constitutionally limit the application of voluntary intoxication as a defense." The reference in *Goddard* to the "gratuitous defense" of voluntary intoxication is *dicta*, and the opinion does not support the conclusion urged by petitioner. The issue in *Goddard* was the defendant's complaint that he was the victim of impermissible burden-shifting when the Delaware trial court instructed the jury that defendant had the burden of proving intoxication. The federal habeas opinion, in the Third Circuit, phrased the question posed as, "Once the defense of intoxication has been raised, was the prosecutor required to prove its absence?" 614 F.2d at 931. The only lesson one learns from *Goddard* is that the state may allow affirmative defenses, and, if allowed, can require the defendant to present evidence of that defense. The Third Circuit did not find unconstitutional burden-shifting because the "plaintiff's case did not rely on a presumption that the defendant was called upon to rebut," *Id.* at 936. Thus, the *Goddard* decision would comport with *Martin v. Ohio*, 480 U.S. 228 (1987), that the state may require a defendant to present evidence to prove the affirmative defense, but may not disallow consideration of the evidence altogether. In any event, reliance on *Goddard* is misplaced in this case, where the Montana Supreme Court specifically held that there is no "defense" of voluntary intoxication available.

Its decision comports with traditional due process analysis as developed in the cases cited therein.

Federal courts have traditionally deferred to the states to define the elements of offenses, the designation of defenses, and the allocation of burden of proof. *Patterson v. New York*, 432 U.S. 197 (1977). This traditional deference should be accorded to the Montana Supreme Court in its decision here and the petition for the writ of certiorari should be denied.

CONCLUSION

For the reasons that there is an independent state law ground for the decision below; that the effect of intoxication on this respondent's mental state is irrelevant and should not have been injected into the record; that there is not a considerable disagreement among state courts of last resort; and that there is not presented an important question of federal law which has not been, but should be settled by this Court, nor does the decision conflict with applicable decisions of this Court; respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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